

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

BROOKE CARDOZA, et al.,  
Plaintiff(s),

VS.

BLOOMIN' BRANDS, INC., et al.,  
Defendant(s).

Case No. 2:13-cv-01820-JAD-NJK  
ORDER  
(Docket No. 362)

Pending before the Court is Plaintiffs’ motion to compel or for modification of the August 18 Order, which they filed on an emergency basis. Docket No. 362. Defendants filed a response in opposition, and Plaintiffs filed a reply. Docket Nos. 373, 377. The motion came on for hearing on October 15, 2015. Docket No. 383.<sup>1</sup> For the reasons discussed more fully below, the motion to modify the August 18 Order is **GRANTED** in part. The motion to compel is **DENIED** without prejudice.

## I. BACKGROUND

This is a wage-and-hour lawsuit involving roughly 9,500 opt-in plaintiffs. On August 18, 2015, the Court ruled that Defendants could propound written discovery on 10% of the opt-in plaintiffs. *See* Docket No. 340 (“August 18 Order”). The Court further ruled that Defendants could take up to 95 depositions of these sampled opt-in plaintiffs, and that Plaintiffs could take one deposition for each

<sup>1</sup> A transcript of the hearing is not currently available. Any citations to the hearing will reference the audio recording and the specific time during the hearing at issue.

1 deposed sampled opt-in plaintiff's manager. The current dispute before the Court centers on Plaintiffs'  
2 counsel propounding 132,860 written discovery requests on Defendants shortly after issuance of the  
3 August 18 Order. Those discovery requests were generated for each of the sampled opt-in plaintiffs  
4 selected for written discovery.

5 The August 18 Order was issued based on competing proposals presented by the parties. At that  
6 time, Plaintiffs requested an order requiring Defendants to produce certain enumerated documents for  
7 each sampled opt-in plaintiff and an order allowing it to depose certain managers for each sampled opt-  
8 in plaintiff. *See* Docket No. 331 at 3-4. While Plaintiffs' proposal allowed for written discovery to be  
9 "served upon each of the Sample Discovery Plaintiffs," there was no explicit indication that Plaintiffs  
10 themselves would seek to propound written discovery on Defendants for each of the sampled opt-in  
11 plaintiffs. *See id.* at 4. Given the lack of any request for the sampled opt-in plaintiffs to propound their  
12 own discovery, any discussion of such discovery was omitted from the August 18 Order.

13 The parties currently dispute whether such discovery is proper. The pending motion to compel  
14 or for modification seeks an order compelling Defendants to respond to the propounded discovery or,  
15 in the alternative, clarifying that Plaintiffs be allowed to propound written discovery.

## 16 **II. EMERGENCY FILING**

17 As an initial matter, the Court addresses Plaintiffs' request to brief and hear the pending motion  
18 on an "emergency" basis. Emergency motions are being filed in this District on a regular basis.<sup>2</sup> Given  
19 the prevalent misuse of emergency motions in this District and to ensure that future emergency motions  
20 are brought with an understanding of the relevant requirements for such a motion, the Court finds it  
21 appropriate to outline in some detail the circumstances in which the filing of an emergency motion is  
22 proper. As Judge Dorsey has succinctly surmised, "You keep using that word. I do not think it means  
23 what you think it means." *United Nat'l Ins. Co. v. Assurance Co. of Am. & Maryland Casualty Co.*,  
24 2014 WL 4960915, \*1 (D. Nev. June 4, 2014) (quoting Inigo Montoya from *The Princess Bride* (Act  
25 III Communications 1987)). The Court issues this order to explain the disfavored nature of emergency  
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28 <sup>2</sup> In the last two weeks alone, the undersigned has received four emergency motions in civil cases.

1 motions, the technical requirements in filing emergency motions, and the substantive standards that must  
 2 be met for motions to be considered on an emergency basis.

3 **A. Emergency Motions are Disfavored**

4 The filing of emergency motions is disfavored because of the numerous problems they create for  
 5 the opposing party and the court resolving them. *In re Intermagnetics America, Inc.*, 101 B.R. 191, 193-  
 6 194 (C.D. Cal. 1989);<sup>3</sup> *see also Painter v. Atwood*, 2014 WL 6871750, \*1 (D. Nev. Nov. 25, 2014). A  
 7 court functions best when the adversarial process is not impeded. The adversarial process requires  
 8 thoughtful, developed argument by both parties explaining what the parties' competing positions are,  
 9 the factual basis for those positions, and the legal authority supporting the arguments presented. *See*,  
 10 *e.g., Maxson v. Mosaic Sales Solutions U.S. Operating Co.*, 2015 WL 4661981, \*1 (D. Nev. July 29,  
 11 2015). The Local Rules for this District foster that adversarial process by providing schedules for  
 12 briefing motions that allow attorneys the time needed to sufficiently present their competing positions.  
 13 For most motions, the Court provides 14 days to file a response opposing a motion and another 7 days  
 14 to file a reply brief. *See* Local Rule 7-2(b)-(c). In some instances, the Local Rules provide for a longer  
 15 period for briefing to ensure that attorneys are able to provide the Court with properly developed  
 16 arguments. Local Rule 7-2(e) (briefing schedule for motions for summary judgment). Where the parties  
 17 require even more time to advise the Court of their positions, they may seek an extension of these  
 18 deadlines. Local Rule 6-1. These rules are in place so that both parties have the opportunity to fully  
 19 present their positions to the Court, giving the Court the ability to rely on thoughtful briefs in making  
 20 its decision on the pending motion.

21 Often times, the Court is not in a position to render a thorough opinion on a motion the moment  
 22 that briefing has been completed. As parties are undoubtedly aware, the Court sometimes takes weeks  
 23 or even longer to fully analyze the issues presented and conduct its own independent research. Drafting  
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 26 <sup>3</sup> The case law discussed herein from the Central District of California refers to "ex parte" motions,  
 27 which include motions to brief cases outside the normal schedule even though notice may be given to the  
 28 opposing party. *See, e.g., Intermagnetics America*, 101 B.R. at 193 (discussing "hybrid ex parte" motions  
 that seek briefing and a hearing outside the framework of the rules). In this District, those motions are  
 referred to as "emergency" motions. *See, e.g.,* Local Rule 7-5(d).

1 a thorough order explaining why the Court has reached its conclusion also sometimes takes a significant  
2 amount of time.

3 This system provides for the optimal functioning of the Court: the parties have sufficient time  
4 to develop and properly present their positions, and the Court has time to thoroughly analyze the  
5 arguments made and render a decision. “Safeguards that have evolved over many decades are built into  
6 the Federal Rules of Civil Procedure and the Local Rules of this court.” *Mission Power Eng’g Co. v.*  
7 *Continental Cas. Co.*, 883 F. Supp. 488, 491 (C.D. Cal. 1995). “Timetables for the submission of  
8 responding papers and for the setting of hearings are intended to provide a framework for the fair,  
9 orderly, and efficient resolution of disputes.” *Intermagnetics America*, 101 B.R. at 193. When parties  
10 file motions on an emergency basis, however, this system is thrown out of whack. Rather than having  
11 time to fully develop their arguments for presentation to the Court, the opposing party is sometimes left  
12 to scramble to put together papers that demonstrate the basic contours of the arguments it would have  
13 presented. Similarly, the Court sometimes has a very limited time frame in which to render a decision  
14 and must do so based on papers that may not be fully developed.

15 In addition to impeding the adversarial process on which the Court relies, the filing of emergency  
16 motions imposes further burdens on the parties and the Court. Most obviously, emergency motions  
17 impose a significant administrative burden on the Court and opposing counsel, as both are required to  
18 abandon other pressing matters to focus on the pending “emergency.” *See, e.g., id.* Other parties are  
19 also unfairly delayed in receiving resolution to their motions, which are given less priority as the Court  
20 shifts its attention to what is presented as a more urgent dispute. *See, e.g., Mission Power*, 883 F. Supp.  
21 at 492. The Court generally prioritizes resolution of those motions that have been pending for a longer  
22 period of time in the interest of fairness to all parties, which it cannot do if it is called upon to resolve  
23 what is presented as an emergency motion.

24 Lastly, the filing of an emergency motion is rife with the possibility of bad faith gamesmanship.  
25 It is not uncommon for the Court to receive emergency motions filed for no apparent legitimate reason  
26 on the eve of a deadline or noticed deposition. Often times, the emergency motion itself is fully  
27 developed, well-researched, and polished. Such motions carry with them the strong implication that the  
28 movant is attempting to game the system by providing itself proper time to present its positions to the

1 Court but depriving the opposing party of a reasonable opportunity to respond, effectively becoming an  
2 *ex parte* motion by which the opposing party has “notice” of its filing but no real chance to adequately  
3 respond. Perhaps even more nefarious, attorneys will sometimes manipulate the rules to *de facto* grant  
4 themselves the relief they are seeking through the delayed filing of a motion seeking emergency relief.  
5 The odor of gamesmanship is often especially pronounced in the context of discovery disputes where  
6 it appears parties routinely seek to delay their discovery obligations by filing an emergency motion for  
7 protective order on the eve of a discovery deadline or noticed deposition.

8 “All of this detracts from the fundamental purpose of the adversary system, namely, to give the  
9 court the best possible presentation of the merits and demerits of the case on each side.” *Id.* at 491. Not  
10 surprisingly, the filing of emergency motions is disfavored and is properly confined to only the most  
11 limited circumstances.

#### 12 **B. Technical Requirements in Filing Emergency Motions**

13 The Local Rules provide several technical requirements that must be met in filing a motion on  
14 an emergency basis. Local Rule 7-5(d) provides the technical requirements for emergency motions  
15 generally, while Local Rule 26-7(c) provides the technical requirements for emergency discovery  
16 motions more specifically.<sup>4</sup>

17 First, the face of the motion itself must be entitled an “Emergency Motion” so the Court has  
18 prompt notice that expedited relief is being requested. *See, e.g.*, Local Rule 7-5(d).

19 Second, the emergency motion must not be filed standing alone. It must be accompanied by an  
20 affidavit providing several key facts necessary for the Court to determine whether, in fact, an emergency  
21 exists and allowing the Court to provide the fairest, most efficient resolution. *See, e.g., United National*,  
22 2014 WL 4960915, at \*1 (discussing Local Rule 7-5(d)). This affidavit must include a detailed  
23 description of the nature of the emergency. *See id.* The affidavit must also provide the contact  
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26 <sup>4</sup> A distinction between the two rules is that, in very limited circumstances in which time does not  
27 permit the filing of a written motion, emergency discovery motions may be made by telephoning the  
28 assigned magistrate judge or district judge. *See* Local Rule 26-7(c). The two rules are otherwise  
substantially similar.

1 information (telephone number and office addresses) of the movant and all other affected parties. *See*  
2 *id.*

3 As with any discovery motion, the affidavit must also provide a certification that, despite  
4 personal consultation and sincere effort to do so, the movant was unable to resolve the matter without  
5 court action. *See, e.g.,* Local Rule 7-5(d)(3), Local Rule 26-7(b); *see also* Fed. R. Civ. P. 37(a)(1). This  
6 requirement carries with it several facets, which are discussed more fully below. It is important to note,  
7 however, that the purportedly emergency nature of a dispute does not obviate the requirement to conduct  
8 a proper meet-and-confer. *See, e.g., Goben v. Wal-Mart Stores, Inc.*, 2013 U.S. Dist. Lexis 26773, \*3-4  
9 (D. Nev. Feb. 27, 2013). To the contrary, a good faith and thorough attempt to resolve the dispute  
10 without Court intervention is even more critical when time is of the essence. If the circumstances are  
11 such that personal consultation is truly not possible, the movant must provide a detailed explanation why  
12 that is the case so the Court can evaluate whether to exercise its discretion to decide the motion despite  
13 the lack of a proper pre-filing conference. *See* Local Rule 7-5(d)(3). Similarly, if no notice whatsoever  
14 was provided to the opposing party regarding the filing of the motion, the affidavit must include a  
15 detailed explanation of why it was not practicable to provide that notice. *See id.*

### 16 **C. Substantive Requirements in Filing Emergency Motions**

17 When a party files a motion on an emergency basis, “[i]t shall be in the sole discretion of the  
18 Court to determine whether any such matter is, in fact, an emergency.” Local Rule 7-5(d)(3); *see also*  
19 Local Rule 26-7(d). Generally speaking, an emergency motion is properly presented to the Court only  
20 when the movant has shown (1) that it will be irreparably prejudiced if the Court resolves the motion  
21 pursuant to the normal briefing schedule and (2) that the movant is without fault in creating the crisis  
22 that requires emergency relief, or at the very least that the crisis occurred because of excusable neglect.  
23 *See, e.g., Mission Power*, 883 F. Supp. at 492.

#### 24 1. Irreparable Prejudice

25 Given the importance of protecting a well-functioning adversarial system, courts do not deviate  
26 from the default rules for properly briefing and resolving motions without very good reason for doing  
27 so. *See, e.g., Maxson*, 2015 WL 4661981, at \*1. To establish that the Court should bypass its default  
28 procedures, the movant must show that it will be irreparably prejudiced unless its motion is heard on an

1 expedited basis. *See Mission Power*, 883 F. Supp. at 492. When such prejudice is absent, sufficient  
2 justification for bypassing the default briefing schedule does not exist and the request may be properly  
3 decided on a non-expedited basis.

#### 4 2. Lack of Fault

5 Emergency motions “are not intended to save the day for parties who have failed to present  
6 requests when they should have.” *Intermagnetics America*, 101 B.R. at 193. The party seeking  
7 emergency relief must demonstrate that it is not at fault in creating the situation that it asserts  
8 necessitates resolution of its motion on an expedited schedule. *See Painter*, 2014 WL 6871750, at \*1.  
9 This showing is not focused on whether the opposing party is at fault for the underlying dispute at issue  
10 in the motion. That is not the relevant inquiry. “It is the creation of the crisis—the necessity for  
11 bypassing regular motion procedures—that requires explanation.” *Mission Power*, 883 F. Supp. at 493.

12 This inquiry requires several basic facts from the movant. First, when did the movant become  
13 aware of the issue in dispute? Second, was the movant diligent in attempting to resolve the dispute  
14 and/or in bringing that dispute to the Court’s attention as soon as practicable? Third, was the movant  
15 otherwise at fault for creating the crisis situation? When an attorney knows of the existence of a dispute  
16 and unreasonably delays in bringing that dispute to the Court’s attention until the eleventh hour, the  
17 attorney has created the emergency situation and the request for relief may be denied outright. *See*  
18 *Allstate Ins. Co. v. Nassiri*, 2011 WL 4905639, \*1 (D. Nev. Oct. 14, 2011) (overruling objections to  
19 magistrate judge order finding an emergency motion to quash subpoena was untimely when three-weeks’  
20 notice was provided for a deposition but the motion to quash was filed only three days before the  
21 deposition); *see also Painter*, 2014 WL 6871750, at \*1 (requiring parties to comply with the deadline  
22 to file pretrial order where emergency motion was filed two business days before deadline because the  
23 movant’s attorney waited roughly 30 days to file the motion).

#### 24 **D. Analysis**

25 In this case, Plaintiffs initially filed their pending motion on an emergency basis without meeting  
26 almost any of the above technical or substantive requirements. The motion did include in the caption  
27 that the motion was filed on an emergency basis. *See* Docket No. 362 at 1. Most significantly, however,  
28 the motion failed to supply any reason whatsoever for the request for expedited briefing and



1 consideration of the motion. Plaintiffs simply included an unadorned request for emergency treatment  
2 of the pending motion. As the above discussion makes abundantly clear, such a request is improper and  
3 the Court therefore denied the request for emergency treatment of the motion. *See* Docket No. 363.

4 Plaintiffs then filed a supplemental request for emergency treatment. Docket No. 364. That  
5 supplement provided several specific reasons for expedited review, which all related to the need for  
6 urgent resolution to ensure that the discovery schedule could continue as currently ordered. *See* Docket  
7 No. 364 at 2-3. Moreover, the papers made it appear as if Plaintiffs' counsel only learned of the  
8 discovery dispute a few days earlier when they received Defendants' objections to the discovery requests  
9 and that they then promptly proceeded to meet-and-confer on the issue. *See, e.g.*, Docket No. 362-1 at  
10 ¶¶ 4-8 (discussing service of the discovery requests on August 26, 2015, receipt of objections on  
11 September 25, 2015, and a meet-and-confer process beginning on September 28, 2015). In those  
12 circumstances, the Court granted the request for emergency treatment of the pending motion. *See*  
13 Docket No. 365.

14 Based on new information provided by Defendants, however, it appears that the request for  
15 emergency consideration of the pending motion should have been denied. The primary dispute at issue  
16 is whether the sampled opt-in plaintiffs are permitted to propound discovery pursuant to the August 18  
17 Order and/or whether that order should be amended to enable such discovery. The existence of this  
18 dispute became apparent to Plaintiffs' counsel a few days after the issuance of the August 18 Order. *See,*  
19 *e.g.*, Docket No. 374 at ¶ 4; Docket No. 374-2. On August 20, 2015, Plaintiffs' counsel wrote to  
20 Defendants' counsel that "it is Plaintiffs' position that they are entitled to take written discovery from  
21 Defendants regarding the Discovery Opt-Ins similar to Defendants, meaning written discovery of all  
22 personnel and of all records touching upon each Discovery Op-Ins' employment." Docket No. 374-2  
23 at 3. On August 25, 2015, Defendants' counsel responded as follows:

24 We disagree that the Order "entitle[s]" Plaintiffs to take "written discovery of all  
25 personnel [sic] and all records touching upon each Discovery Op-Ins [sic] employment."  
26 Plaintiffs requested an order that required "Defendants [to] produce the following  
27 documents for each of the Sample Data Plaintiffs: a) personnel files; b) work schedule  
28 data; c) clock-in/clock-out data; and d) wage compensation data," which Judge Koppe  
already considered and did not grant. *See* ECF Nos. 331 at 3, 340. To the extent that  
Plaintiffs are seeking "written discovery" in addition to the production of those  
documents, Plaintiffs did not meet and confer about such discovery prior to filing their  
opt-in discovery plan, nor did they request such discovery in their opt-in discovery plan



1           thereby depriving Defendants of an opportunity to either reach an agreement with  
 2           Plaintiffs to be incorporated into the opt-in discovery proposals or to brief the issue and  
           have it considered by the Court.

3       Docket No. 374-2 at 2. Hence, the existence of the current dispute was known to Plaintiffs' counsel by  
 4       August 25, 2015. And yet Plaintiffs' counsel waited for more than a month to bring the dispute to the  
 5       Court's attention, filing the instant motion on September 30, 2015, and then seeking emergency  
 6       treatment of their motion based on upcoming discovery deadlines.<sup>5</sup> That decision to wait is especially  
 7       puzzling given Plaintiffs' counsel's later protestations that the "aggressive schedule set by the Court"  
 8       made it especially important for prompt resolution of the dispute. *See* Docket No. 364 at 3. Plaintiffs'  
 9       counsel was well aware of that schedule in August when they made the decision to forego requesting  
 10      relief from the Court and proceeded to propound 132,860 written discovery requests that Defendants'  
 11      counsel had already argued were improper.

12       In short, Plaintiffs' counsel created the emergency situation.<sup>6</sup> In light of the above, the request  
 13      for emergency relief was not proper and the Court will only address the merits of the motion in the  
 14      limited fashion discussed more fully below. The other issues in dispute must be brought to the Court  
 15      in a proper manner.

### 16   **III. MEET AND CONFER**

17       "Discovery is supposed to proceed with minimal involvement of the Court." *F.D.I.C. v. Butcher*,  
 18      116 F.R.D. 196, 203 (E.D. Tenn. 1986). Counsel should strive to be cooperative, practical and sensible,  
 19      and should seek judicial intervention "only in extraordinary situations that implicate truly significant  
 20      interests." *In re Convergent Techs. Securities Litig.*, 108 F.R.D. 328, 331 (N.D. Cal. 1985). A threshold  
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22           <sup>5</sup> Plaintiffs' counsel argued at the hearing that bringing the dispute to the Court's attention in August  
 23      would have amounted to seeking an advisory opinion. *See* Hearing Rec. (10/15/2015) at 1:08 -1:09 p.m.  
 24      This contention borders on the ridiculous. The parties were disputing at that time the meaning of the August  
 25      18 Order and the scope of discovery allowed in light of that order. Plaintiffs have now moved to modify  
     that order, which is the same relief they could have sought in August.

26           <sup>6</sup> The Court herein focuses on Plaintiffs' counsel's knowledge of the existence of the pending  
 27      dispute. Their fault in creating the emergency situation is compounded by the fact that they did not seek the  
 28      disputed discovery when presenting their discovery proposal to the Court in the first place, leading to its  
     omission from the August 18 Order. *See* Section I.

1 issue in the review of any motion to compel is whether the movant made adequate efforts to resolve the  
2 dispute without court intervention. Federal Rule of Civil Procedure 37(a)(1) requires that the party  
3 bringing a motion to compel discovery must “include a certification that the movant has in good faith  
4 conferred or attempted to confer with the person or party failing to make disclosure or discovery in an  
5 effort to obtain it without court action.” Similarly, Local Rule 26-7(b) provides that “[d]iscovery  
6 motions will not be considered unless a statement of the movant is attached thereto certifying that, after  
7 personal consultation and sincere effort to do so, the parties have not been able to resolve the matter  
8 without Court action.”

9 Judges in this District have held that “personal consultation” means the movant must “personally  
10 engage in two-way communication with the nonresponding party to meaningfully discuss each contested  
11 discovery dispute in a genuine effort to avoid judicial intervention.” *ShuffleMaster, Inc. v. Progressive*  
12 *Games, Inc.*, 170 F.R.D. 166, 171 (D. Nev. 1996). The consultation obligation “promote[s] a frank  
13 exchange between counsel to resolve issues by agreement or to at least narrow and focus matters in  
14 controversy before judicial resolution is sought.” *Nevada Power v. Monsanto*, 151 F.R.D. 118, 120  
15 (D.Nev.1993). To meet this obligation, parties must “treat the informal negotiation process as a  
16 substitute for, and not simply a formalistic prerequisite to, judicial resolution of discovery disputes.”  
17 *Id.* This is done when the parties “present to each other the merits of their respective positions with the  
18 same candor, specificity, and support during the informal negotiations as during the briefing of discovery  
19 motions.” *Id.* To ensure that parties comply with these requirements, movants must file certifications  
20 that “accurately and specifically convey to the court who, where, how, and when the respective parties  
21 attempted to personally resolve the discovery dispute.” *ShuffleMaster*, 170 F.R.D. at 170. Courts may  
22 look beyond the certification made to determine whether a sufficient meet-and-confer actually took  
23 place. *See, e.g., F.D.I.C. v. 26 Flamingo, LLC*, 2013 WL 2558219, \*1 (D. Nev. June 10, 2013) (quoting  
24 *De Leon v. CIT Small Business Lending Corp.*, 2013 WL 1907786 (D. Nev. May 7, 2013)).

25 With respect to the pending motion to compel, Plaintiffs’ counsel provided a certification that  
26 a good faith meet-and-confer had been conducted. *See, e.g.*, Docket No. 362 at 2. As Defendants’  
27 opposition makes clear, however, the meet-and-confer process did not include meaningful discussion  
28 as to many of the specific objections that Defendants raised in response to the discovery now in dispute.

1 *See, e.g.*, Docket No. 373 at 11-13; *see also* Docket Nos. 362-8, 362-9, 362-10 (letters regarding meet-  
 2 and-confer omitting reference to any specific objections raised by Defendants).<sup>7</sup> Plaintiffs' counsel  
 3 acknowledged at the hearing that a proper meet-and-confer was not conducted with respect to the  
 4 individualized objections. *See* Hearing Rec. (10/15/2015) at 1:16 - 1:17 p.m.<sup>8</sup> The Court finds that the  
 5 truncated discussion during the meet-and-confer process was insufficient to meet the counsel's  
 6 obligations to engage in a meaningful discussion as to each discovery dispute with the same specificity  
 7 and support during that process as they would in briefing a subsequent motion.

8 In the circumstances, the Court will resolve herein the threshold issue of whether Plaintiffs are  
 9 permitted to propound written discovery for the sampled opt-in plaintiffs. The Court will resolve that  
 10 issue through the alternative motion to modify the August 18 Order. The propriety of the disputed  
 11 discovery is not otherwise properly before the Court, and the motion to compel is DENIED without  
 12 prejudice.

#### 13 **IV. WRITTEN DISCOVERY PROPOUNDED BY SAMPLED OPT-IN PLAINTIFFS**

14 The Court will now turn to whether Plaintiffs should be permitted to propound discovery on  
 15 Defendants for each of the sampled opt-in plaintiffs. Neither party presents significant authority  
 16 analyzing this issue. Instead, both parties rely primarily on the same case in presenting their competing  
 17 positions, a case which explicitly discusses the issue in a single sentence. *See Cranney v. Carriage*  
 18 *Servs., Inc.*, 2008 WL 2457912 (D. Nev. June 16, 2008). In that case, the court addressed the discovery  
 19 that should be allowed with respect to opt-in plaintiffs in FLSA actions. Although some courts have  
 20 treated opt-in plaintiffs in a collective action as ordinary party plaintiffs subject to the full range of  
 21 discovery, the *Cranney* court opted for the alternative approach of allowing some individualized  
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23 <sup>7</sup> Similarly, Plaintiffs' motion does not address the specific objections raised, but rather focuses on  
 24 the threshold issue of whether Plaintiffs were permitted to propound the written discovery generally.

25 <sup>8</sup> At the hearing, Plaintiffs' counsel took the position that there was no reason to meet-and-confer  
 26 regarding any issue other than the threshold issue of whether the sampled opt-in plaintiffs could propound  
 27 discovery. *See* Hearing Rec. (10/15/2015) at 1:16 p.m. Plaintiffs' counsel fails to explain how, in the event  
 28 the Court agreed with him on the primary dispute, the Court could then compel Defendants to respond to  
 132,860 written discovery requests without first determining whether Defendants' other objections render  
 further response improper.

1 discovery with reasonable limitations. 2008 WL 2457912, at \*2-3. In particular, the court noted that  
2 the full scope of discovery authorized by the Federal Rules of Civil Procedure would undermine the  
3 purpose of collective actions, but that fairness dictates that the defendants should be permitted to  
4 conduct sufficient discovery to support a motion to decertify the collective action. *Id.* at 3. To decide  
5 the extent of discovery allowed, the court turned to the factors outlined in Federal Rule of Civil  
6 Procedure 26(b)(2)(C), including whether the burden of the discovery outweighs its likely benefit. *Id.*  
7 Taking that into consideration and in the circumstances of that case, the court permitted the defendants  
8 to obtain individualized discovery from 10% of the opt-in plaintiffs. *Id.* Critically important to the  
9 instant dispute in this case, the court also decided that the defendants would be responsible for  
10 responding to plaintiffs' discovery from the same group. *Id.*

11 Based on the circumstances of this case, the arguments presented, and the *Cranney* decision, the  
12 Court finds that Plaintiffs should be permitted to propound some written discovery on Defendants. This  
13 discovery will have its limits, however. Such discovery must be relevant to certification issues. In  
14 addition, Plaintiffs have not shown based on the record currently before the Court that their need for the  
15 discovery as currently propounded is sufficient to outweigh the burden on Defendants in responding.  
16 While the Court makes no final determination herein as to the extent of discovery that Plaintiffs should  
17 be permitted on behalf of the sampled opt-in plaintiffs, it appears that the discovery already propounded  
18 is excessive in light of the factors in Federal Rule of Civil Procedure 26(b)(2)(C).<sup>9</sup>

19 Lastly, the Court agrees with Defendants that concurrently serving and answering written  
20 discovery in this case is not proper. It appears that some of the sampled opt-in plaintiffs may not  
21 respond to Defendants' discovery requests and may otherwise abandon their claims. It makes little sense  
22 for Defendants to respond to written discovery for such sampled opt-in plaintiffs. Moreover, it is not  
23 clear that all of the discovery requests will apply to all of the sampled opt-in plaintiffs given that the  
24 nature of some of their claims may vary, but the exact nature of their claims may not be known until they  
25 respond to Defendants' discovery requests. *See* Hearing Rec. (10/15/2015) at 1:27 - 1:28 p.m. In these

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28 <sup>9</sup> In addition, based on the representations at the hearing, there appears to be no need for Defendants  
to prepare four separate responses to the discovery requests.

circumstances, the best approach is to stagger the deadlines for discovery from the sampled opt-in plaintiffs and Defendants so that these factors may be taken into consideration before discovery is propounded on behalf of the sampled opt-in plaintiffs.

With the guidance provided above, counsel are ordered to meet-and-confer and to submit a joint proposal on proceeding with this phase of discovery. That proposal shall include the ability of the sampled opt-in plaintiffs to propound written discovery. While it appears based on the current record that the extent of written discovery permitted the sampled opt-in plaintiffs should be less than what is allowed Defendants, the Court will not determine the precise amount at this time and counsel must confer on that issue.<sup>10</sup> The joint proposal must also provide a plan for staggering the discovery from the sampled opt-in plaintiffs and Defendants. The Court is cognizant that the guidance provided herein may require extending the deadlines currently in place, and counsel may include a request to extend those deadlines in their joint proposal. The joint stipulated proposal must be filed no later than October 30, 2015.<sup>11</sup>

#### V. CONCLUSION

For the reasons discussed more fully above, the motion to modify the August 18 Order is **GRANTED** in part. The parties shall promptly confer in light of the guidance provided in Section IV. The motion to compel is **DENIED** without prejudice.

IT IS SO ORDERED.

DATED: October 16, 2015

  
\_\_\_\_\_  
NANCY J. KOPPE  
United States Magistrate Judge

<sup>10</sup> Counsel should also confer on whether it makes sense for Defendants to produce certain documents without a formal written discovery request. If so, that should be factored into the amount of discovery the parties agree should be allowed for the sampled opt-in plaintiffs.

<sup>11</sup> The Court trusts that counsel can resolve these issues without bringing a further dispute before the Court. Setting the parameters of discovery is expected to be accomplished through stipulation. *See, e.g.*, Local Rule 26-1(d). The Court again reiterates that counsel should cooperate with one another in formulating an appropriate discovery plan and should only seek further Court involvement as a last resort.